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APPELLANTS' OPENING BRIEF

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IN THE

Supreme Court of the United States

October Term, 1969
No. 399

DANIEL ROWAN, dba AMERICAN BOOK SERVICE, *et al.*,
Appellants,

vs.

UNITED STATES POST OFFICE DEPARTMENT, *et al.*

APPELLANT'S OPENING BRIEF.

Reference to Reports.

The within case consisting of the opinions delivered in the court are as yet unreported.

Statement of Grounds of Jurisdiction.

The jurisdiction of this court is invoked upon the grounds that the case below involved the denial of a granting of an interlocutory injunction by a three-judge court and, further, a dismissal of the action below pursuant to Rules 56 and 12(b) of the Federal Rules of Civil Procedure. Authorization for direct appeal to this court is provided for in Title 28 U.S.C. Section 1253. The three Judge court was convened pursuant to Title 28 U.S.C., Section 2284.

The ruling and judgment in the case below was April 30, 1969 and the date of entry of said decision and judgment was April 30, 1969. Notice of Appeal was

filed within 60 days from the date of entry of said judgment and particularly done on May 28, 1969. The Notice of Appeal was filed in the United States District Court for the Central District of California. No rehearing date was requested nor granted.

A jurisdictional statement on behalf of the appellants herein was filed on the 28th day of July, 1969.

The within appeal was docketed in the Supreme Court of the United States on July 28, 1969 designated as No. 399 October term, 1969.

Probable jurisdiction was noted October 27, 1969.

Constitutional Amendments and Statutes.

First Amendment to the United States Constitution.

Congress shall make now law respecting an establishment of regligion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Advertisements In The Mails. Prohibition of Pandering. Section 301 of Public Law 90-206 (codified as 39 U.S. Code, Section 4009).

(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addresses thereof.

(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addresses from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

(i) For the purposes of this section—

(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

(2) the term "children" includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship.

Added Pub.L. 90-206, Title III, § 301(a), Dec. 16, 1967, 81 Stat. 645.

The Rules of Practice 39 C. F. R. 956 are set forth in the appendix to this brief at page 30 through page 35.

The Questions Presented by the Appeal.

1. Is Section 301 of Public Law 90-206 (*Title 39 U.S.C. 4009*) unconstitutional?

2. Does *Section 301 of Public Law 90-206* (*39 U.S.C. Section 4009*) violate the First Amendment of the Constitution of the United States as an abridgement of appellants right of free speech and freedom of the press?

3. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Fifth Amendment of

the Constitution of the United States, in that it denies appellants due process of law?

4. Does *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Constitution of the United States in that said statute is vague, ambiguous, standardless, and as applied to appellants an unlawful delegation of power?

5. Do the procedures available to appellants in connection with hearings provided for pursuant to *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)* violate the Fifth Amendment of the Constitution of the United States in that it denies appellants due process of law?

6. Are appellants entitled to injunctive relief enjoining the execution, implementation and administration of *Section 301 of Public Law 90-206 (39 U.S.C. Section 4009)*?

7. Is the denial of injunctive relief to appellants herein an abuse of discretion?

8. Are the Findings of Fact supported by the evidence herein?

9. Are the Conclusions of Law supported by the facts?

10. Inherent in Numbers 8 and 9 herein is the question whether the Appellants' action herein was properly dismissed pursuant to Rule 56 and 12(b) of the *Federal Rules of Procedure*.

11. Are the rules of practice (39 C.F.R. 956) in proceedings relative to violations under Title 39 U.S.C. 4009 unconstitutional in that they violate the Fifth Amendment of the Constitution of the United States?

Statement of the Case.

Appellants are publishers, advertisers, distributors, and are in the business of mailing services as well as operating mail order houses.

Section 301 of Public Law 90-206 (39 U.S.C. §4009) became effective as an act of Congress on the 15th day of April, 1968. It was a rider to the postal rates and salary statute. Appellants herein are directly and overtly effected by this legislation, its administration, enforcement and implementation. (A 17-38.)

Appellants herein received within six months of the enactment of 301 Public Law 90-206 between 7,000 and 10,000 Prohibitory Orders (A 17-38.) Prohibitory Orders are the first step embodied within that legislation. A Prohibitory Order pursuant to this legislation is issued by the Postmaster General to a mailer directing him and his agents or assigns to refrain from further mailings to a named addressee. A Prohibitory Order is issued upon the request of an addressee.

The Prohibitory Order expressly prohibits the sender and his agents or assigns from making any further mailings to the addressee effective on the thirtieth calendar day after receipt of the order. The order must also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, the Order must prohibit the sender or his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

The fact that appellants had received collectively between 7,000 and 10,000 Prohibitory Orders was sub-

stantiated by Affidavits filed in support of an action originated in the Court below. (A 17-38.) Said Affidavits were uncontroverted throughout the matter in the Court below. Plaintiffs and the government agreed virtually on the meaning of the statutes. (A 45, 46, 47, 48, 50, 51.) The Court below interpreted the statute differently. (A 58-79.)

Appellants originated an action upon a complaint and petition for declaratory relief to declare said public law unconstitutional in that it is violative of the United States Constitution and, namely, Article I, § 8, The First Amendment and Fifth Amendment thereto. (A 3-11.) Appellants asserted also that the law was an unlawful delegation of power, was ambiguous and also standardless, all in derogation of the Constitution of the United States (A 3-11.) Appellants sought an injunction pursuant to 28 U.S.C. 1253. (A 3-40.)

The issuance of a Prohibitory Order Pursuant to said statute is initiated by a recipient of mail, if in his sole discretion, he believes that pandering advertisements are erotically arousing or sexually provocative. Subsequent to the issuance of the Prohibitory Order, the Postmaster General, whenever he believes that such a sender or anyone acting on his behalf, has violated or is violating the Prohibitory Order, must serve upon the sender a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. Should such notification be joined by a sender, then a hearing, if requested, shall be set for the purposes of determining whether the Order given has been or is being violated.

The hearing that follows is conducted pursuant to rules of procedure contained in 39 C.F.R. part 956 (A 30-35.)

The Rules of Procedure do not permit the subpoena process, confrontation by complainant, nor is the procedure within the Administrative Procedure Act. (A 30-35.) The statute particularly exempts procedures contained therein from the Administrative Procedures Act. The regional counsel for the area serves as the hearing officer. (A 30-35.) The only evidence offered by the Government is the request for a Prohibitory Order and that, in fact, same has been directed to a party. Issues in question as concerning the constitutionality of procedures or substance are beyond the scope of the hearing officer. (A 24, 25.)

Once it is decided at such hearing that a party has violated the Prohibitory Order or that a party's agents or assigns have done so, the regional counsel requests of the Attorney General of the United States to give consideration to making application to a District Court of the United States for an order directing compliance with the above captioned Prohibitory Order.

Violation of an order of the District Court of the United States is punishable by contempt.

A three-judge court convened to hear the matter below dismissed appellants' complaint. (A 80.) It therefore concluded that Title 39 U.S.C., Section 4009 was not unconstitutional.

Summary of Argument.

I.

Section 301 of Public Law 90-206 (codified as 39 U.S.C. 4009) violates the Constitution of the United States in that it is an abridgement of the First Amendment thereto. The statute provides for a direct restraint and censorship upon freedom of expression, speech and press. It does this by vesting complete control of the flow of mail in individuals who may exercise that power upon a subjective determination all their own. Once an individual determines, within his sole discretion, that mail is erotically arousing or sexually provocative to himself, he may obtain a Prohibitory Order directed to the mailer which would cause that mailer to cease and desist from any further mailing of any kind whatsoever to this recipient. In addition, the mailer is further ordered by the Postmaster General to not mail to the recipient, any mail whatsoever, but also to cease and desist from transacting, selling, renting or exchanging any lists upon which the recipient's name is contained. This power vested in an individual, and supported and buttressed by federal governmental action, is a complete restraint and censorship upon freedom of speech and press. It has a chilling and inhibiting force upon free speech and press.

II.

The same action and power constitutes a violation of the Fifth Amendment of the Constitution in that it is a denial of due process of law. The Order, if violated, may be enforced ultimately by the District Court, and punished by contempt. No procedural standards of a

Constitutional calibre are provided for the administrative proceedings that purportedly are available to a mailer. In addition, the Court below contends that when the hearing procedure is called into effect, by the mailer, the Postmaster General clearly must review the Second mailing of the sender and measure it against the First mailing which initiated the Prohibitory Order in order to determine whether, in fact, a violation has occurred. This view of the Court below is contrary to the legislative history, committee reports and testimony given before the Senate Committee reviewing this legislation. Needless to say, if this were the situation then in fact there are no standards by which such a determination can be made, because in the first instance, the Prohibitory Order was obtained predicated upon a subjective view of a recipient. On the other hand, if the interpretation is as contended by Appellant, and as is supported by the plain meaning of the language together with the legislative history, and all additional indicia, then it merely means that a violation occurs upon the subsequent mailing of any type of material regardless of its substance or matter. Further, a violation would occur merely in the transaction or dealing with the list upon which the parties name may appear who had at some other time obtained a Prohibitory Order against such a mailer. Appellants urge that there is a denial of due process, both procedurally with regard to the hearing procedures, the imposition of the restraint and censorship aspects of the statute, as well as the manner by which the use of property is being curtailed by way of Federal legislation.

III.

Legislative history, the plain meaning of the statute, the committee reports, the testimony of the Attorney General of the United States, the General Counsel of Post Office Department, and other interested persons clearly indicate what the interpretation of the statute should be. The interpretation of the statute is consistent with that which Appellants argued in the Court below. The Court below stressed that if, in fact, Appellants were correct in their interpretation then, indeed, the government was in "Hot water". The Court then attempted to "shrink the loosely woven fabric of the statute down to Constitutional size." Appellants urge that a reading of all of the indicia upholds their interpretation of the statute and hence the statute must fall by its own language and weight.

IV.

Appellants argue that the statute is void because it involves an unlawful delegation or standardless delegation or is ambiguous. Further, Appellants urge that the statute is void for vagueness. There is no question but that if the power granted to the individual in subsections (a), (b) and (c) of the statute were granted to the Postmaster General, the delegation of power would run rampant. The problem is that no legality is acquired merely by granting this power to an individual, in the first instance due to the fact that subsequent to the Prohibitory Order the network of governmental machinery is put in motion that ultimately could lead its way to a citation for contempt against the mailer. One of the factors that makes this possible is the broad and standardless delegation of power to the individual to determine in his sole discretion that which is erotically arousing or sexually provocative.

Moreover, and even more fundamental to the defect, is that all subsequent mailings thereafter are made illegal and punishable through pressure by process or pain of contempt, all of which is predicated upon some standardless statute declaring certain written expression illegal by operation by reaction. Further, the illegality that occurs merely by virtue of dealing, renting, exchanging or transacting with lists has no guideline for illegality.

V.

The Court below and the government have argued and urged that commercial activity is ascribed a lower rung on the First Amendment "ladder" than other forms of speech. Indeed, there is an implication that, in fact, by virtue of the commercial aspects of the mail involved that it is not wrapped in the impervious paper of the First Amendment. Appellants argue that which has been repeated often which is namely freedom of expression, speech and press, does not lose its preferred status because it may be done under the auspices of commercialism. Appellants argue that in fact if this were the case, an advertisement for the sale of a Bible is capable of triggering off a violation of the statute, whereas, the offering for free of erotically arousing and sexually provocative material would fall beyond the purview of this statute. Needless to say, this would all be to the frustration of the purposes of Congress. Commercial activity cannot erode or corrode First Amendment guarantees and rights.

VI.

Throughout the case below and during aspects of the legislative history preceding this statute was the purported claim for the pitting of the First Amendment rights of free speech and press against a purported First Amendment right of privacy. The right of pri-

vacy is not in issue if the statute fails upon any of the preceding grounds.

Indeed if the statute is null and void then the conflict is manufactured. However assuming the analysis reaches this distance it is clear that a zone of privacy is not encroached upon nor is the matter so rooted in the traditions and conscience of our people as to be ranked as fundamental. In any event the right of free speech and press coupled with the fifth amendment rights involved must out-balance the right of privacy assuming it to be more than an amorphous concept.

VII.

The statute removes the hearing procedure from the Administrative Procedure Act. It further removes judicial review from the Administrative Procedure Act. It represents a step backwords in the administration of justice. In exempting same a statutory scheme has been devised to seriously trammel the rights of mailers.

VIII.

Since the court below upheld the statute against the challenge made below, lt therefore also denied appellants claim for an interlocutory injunction against the enforcement, implementation and administration of the statute. The court adopted its opinion as the findings of fact and conclusions of law. It dismissed the complaint of the appellants (plaintiffs below). It is clear that the uncontroverted affidavits of appellants demonstrating irreparable harm and multiplicity of litigation and the government's concurrence in appellants' interpretation of the statute still gave rise to an adverse ruling to appellants. This was only due to statutory construction. For all of the foregoing reasons the injunction should have issued.

ARGUMENT.

I.

Communication Via the Mails Is Protected Speech and Press Within the First Amendment of the Constitution of the United States and Therefore Enjoys Preferred Status.

The opposable thumb, the primate vertabrae, and the ability to communicate separates man from the entire animal kingdom. An attempt by organized society to alter the two former criteria would be unimaginable. The attempt to circumscribe and proscribe the third distinguishing feature because it involves the emotions and intelligence of man has been the basis for many arguments before this court.

The freedom to communicate orally and by the written word and, indeed, in every manner whatsoever is imperative to a free and sane society.

There are many avenues and arteries through which the dissemination and distribution of written materials flow. The postal system is certainly one of the more important media in this complex society. This artery becomes no more subject to sclerosis by control and censorship just because it is of governmental emanation than any of the other avenues through which we seek to communicate from human to human.

It is clear that the use of the mails for the dissemination and distribution of written materials is well within the zealous protection and guarantee against abridgement afforded by the First Amendment to the United States Constitution.

It seems important to reemphasize this tenet. A purpose is served, particularly if it serves to impede or

even slow down a rapid attempt to circumvent or circumscribe this basic truth of our law and sanity.

Justice Oliver Wendell Holmes stated in *Milwaukee Publishing Co. v. Burleson,* 255 U.S. 407, 437 that

> "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost a part of free speech as the right to use our tongues . . ."

In the case of *Speiser v. Randall,* 357 U.S. 513, 518, the Court stated:

> ". . . It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which, if directly attempted, would be unconstitutional."

For the purposes of emphasis, may it be noted that this Court in the case of *Manuel Enterprises v. Day,* 370 U.S. 478, 504, through Jutice Brennan, taught,

> ". . . But at least it is arguably correct, and necessary, if we are to avoid the sections probable Constitutional infirmity (see *Near v. Minnesota,* 284 U.S. 697; *Summerfield v. Sunshine Book Company,* 95 U.S. Ap. C. 169, 221 F. 2d 42). *If construed as a provision allowing the Postmaster General to exclude all matters sent by a person who had previously sent violative matter* (emphasis added) such an exclusion by attaint could not be justified by the hoary dogma' . . . that the use of the mails is a privilege on which the government may impose such conditions as it chooses, (for that) has long since evaporated." *Roth v. United States,* 354 U.S. 476, 504 (dissenting opinion); *Hannigan v. Esquire, Inc.,* 327 U.S. 156; *Speiser v. Randall,* 357 U.S. 513, 518).

Freedom of speech and, press have been designated as the cornerstone of our society. It is within our judicial system that the marketplace of ideas has been given a foundation. Since this right has been given such preferred and critical status within our politico-social framework, its reemphasis must precede any and all argument in this matter.

This Court reaffirmed that the use of the mails is within the First Amendment in the case of *Lamont v. Postmaster General,* 381 U.S. 301. This Court stated at page 306 thereof, the following:

> "Here the Congress-expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell, Thomas,* and *Murdock* cases sought to control the flow of ideas to the public, so here Federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannigan v. Esquire, Inc.,* 327 U.S. 146, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage . . ."

Better histories and enunciations of this proposition indeed have been made prior to this Brief. However, it is against this framework and background that Appellant's case is presented.

Appellant's conduct and activity involve the use of the United States mails. It is the use by Appellants of this media that is brought in question by 301 Public

Law 90-206 (39 U.S.C. 4009). Appellants' conduct and use as it is prescribed and delimited by this statute is brought to this Court for its scrutiny and review within the context of the protection, insulation and significance of the First Amendment.

Appellants' absolute right to freedom of expression and communication as guaranteed by the First Amendment of the Constitution of the United States is placed in jeopardy by intrusion and partial annihilation due to this statute. The power of government or an individual through government to prevent or deter anyone from the free use of the mails flies in the face of the First Amendment and since the statute brought before this Court does this it is sufficient and adequate reason to declare it unconstitutional.

II.

The Prior Restraint, Prohibition and Censorship of Speech in 39 U.S.C. 4009 Causes It to Be Repugnant to the First Amendment of the Constitution.

Restraint and censorship permeate the entire text of this law. In Section (a) of the statute, the initial restraint and censorship is deposited with an addressee. The addressee may have a Prohibitory Order issued against a mailer such as Appellants. No discretion and no guideline are established for the issuing of the order by the Postmaster General, once he receives such a request from an addressee. The Order issues without a hearing. Only the sole discretion of the addressee that the advertising is erotically arousing or sexually provocative puts the force in motion which dictates to the Postmaster General that a prohibitory and injunctive mandate be issued to a malier or sender such as Appel-

lants. Herein lies a direct restraint which, if granted directly to the Postmaster General, would certainly fall before the First Amendment of the Constitution of the United States. Everyone is given the power to stand astride the mail.

In the case of *Walker v. Popenoe*, 149 F. 2d 511 (1945) where a Court addressed itself to the powers of the Postmaster General in dealing with purportedly obscene material in the flow of the mail enunciated in terms explicitly which emphasize the restraint and censorship power awarded to individuals under the aforesaid subsection in this matter. The Court in that case stated as follows:

> "In determining whether any publication is obscene, the Postmaster General necessarily passes on the question involving the fundamental liberties of a citizen, which is a judicial and not an executive function and must be exercised according to the idea of due process implicit in the Fifth Amendment. . . ."

The second aspect of restraint and censorship within this statute occurs in the delegation of power embodied in subsection (d). There the Postmaster General is empowered to decide whether a sender or anyone acting on his behalf has violated or is violating the Prohibitory Order mentioned in subsection (a) and if so to serve upon the sender a complaint. The complaint is to state the reasons for his belief.

The order upon which the complaint is predicated is made appropriate under subsection (c) of the statute. It provides all of the inhibitions and prohibitions that shall be embodied in the order. An example of such an order

upon which the decision set forth in Exhibit E attached to the affidavit of Lee Jay Winkler (A 22, 28, 29) is noted herein.[1]

The confrontation with the language in subsection (c) concerning the "making of any further mailings to the designated addressees" raises one of the most critical issues in this case. The ramifications are several and are as follows:

One interpretation of that language is that a sender who has been once prohibited from mailing can mail no other material whatsoever to an addressee. Support for this interpretation is manifestly clear. The government urged in the Court below that in fact this was the interpretation to be given to the statute at hand. (A 45-51.) Indeed, it is in accord with the intention of the authors of the Law and Amendment and other members of the House of Representatives.[2]

If in fact this is the interpretation, then it is respectfully submitted that the statute is patently fatal in its construction. This would place a prohibition, restraint and chill on any type of communication via the mail once a sender has been the subject of a Prohibitory Order regardless of the content of the materials which he would subsequently mail.

Appellants respectfully submit that in view of the position taken by the author of the Bill, as well as the government in the Court below, that no other interpretation can be given to this statute and hence it must be stricken as being in derrogation of the First Amendment to the Constitution of the United States.

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[1]Attached as Exhibit A hereto.

[2]The Congressional Record, 90th Congress, First Session, H. 13265, 6 (October 11, 1967).

The Court below via their opinions interpret subsection (d) of the statute as meaning "similar materials" rather than any mailings whatsoever. It is contended therein that after the first mailing that all other mailings an be measured by the objectionable material of such first mailing. It is stated and reasoned that the determination by the Postmaster General to issue a complaint because of "such mailings" is done by measuring a second mailing in terms of the first. The court below urges additionally that this is of no import or impact because no sanction is levied as a result of the complaint issued under subsection (d).

Appellants urge that the power vested in the Postmaster General to determine whether mailings subsequent to the issuance of a Prohibitory Order are similar in nature or even such other mailings which initially arose in the mind of someone other than the Postmaster General. (and which is a prelude to further actions in the United States District Court) is of such a chilling inhibition upon a sender's First Amendment rights that it cannot be overlooked or minimized. At this point, following the issuance of the prohibitory order a sender or disseminator must determine, discern, review, determine and screen what is "such other mail" or by what standard the various postmasters throughout the United States will make their determination, as they sit astride the mail. Here the element of prior censorship, self censorship and restraint is introduced and intrudes regardless of whether there be penalty immediately, directly, or in futuro so as to make the statute unconstitutional in its abridgement of First Amendment guarantees.

Assuming for purposes of argument that the term "pandering advertisement" has been adequately and unambiguously defined in the statute, it is clear that it is not pandering advertisements *per se* that are within the purview of this legislation, but rather pandering advertisements which a recipient in his sole discretion deems erotically arousing or sexually provocative. The coalition of factors must exist. The Postmaster issues upon his belief what someone else believes, in his sole discretion, to be an erotically arousing or sexually provocative pandering advertisement. That such a situation can only create an inhibiting and chilling factor upon persons using the mail seems to be abundantly clear.

As a somewhat collateral issue, it may be appropriate to inquire rhetorically what the recipient's rights would be if he disagreed with the Postmaster General's belief that the second mailing was similar to the first mailing. It comes to mind that the recipient might then have to do an affirmative act to re-obtain that mail or other mail which he personally does not believe to be erotically arousing or sexually provocative just as the Appellant Lamont had to do under the former 39 U.S.C. 4008 previously declared unconstitutional in *Lamont v. Postmaster General,* 381 U.S. 301 (1965).

The restraint and chilling effect imposed at this juncture is by the United States Post Office. It is governmental action. The Post office, with its numerous postmasters each administering the law by way of their beliefs as to what is similar to previous mailings and which have been personally determined as erotically arousing and sexually provocative mail by a myriad of recipients.

In addition subsection(c) of the statute clearly indicates that the initial Prohibitory Order must direct the sender and his agents or assigns to delete immediately the names of a requesting addressee from all mailing lists owned or controlled by the sender or his agents or assigns and, further, the Order must prohibit the sender or his agents or assigns from selling, renting, exchanging or transacting lists bearing the names of requesting addressees.

The requirement that the foregoing be contained in the Order is without regard to the nature of the lists or the purposes for which such other lists may be used. The requirement does not discuss whether these lists must involve similar material as that which gave rise to the issuance of the Order.

The plain language of the statute would therefore seem to give credence to the appellants and the first interpretation of the statute. That interpretation was *any further mailings whatsoever are,* in fact, prohibited. In addition, it becomes clear that whatever interpretation is adopted, these additional prohibitions concerning the lists that are to be included within the initial Order serve as a prior restraint and censorship upon senders. No regard is given to the purpose or nature of mail arising out of these other lists.

Further, Subsection (f) provides that receipt of mail matter 30 days or more after the effective date of the Order provided for by the section shall create a rebuttable presumption that such mail was sent after such effective date. No descriptive or modifying words concerning "mail matter" are to be found in that section. Rather, the broad term connotes and indicates that it is

mail matter of any kind whatsoever which is proscribed by any of the preceding subsections.

Attention must also be drawn to the fact that innocence or willfullness is not made a necessary ingredient by this statute. Indeed, if one innocently makes a subsequent mailing under either one of the interpretations (that is "any mail whatsoever" or "similar mail") he has violated the Prohibitory Order. Keeping this well in mind, a censorship imperative whether self or external is created as to all outgoing mail by a sender. There is no escape or protection by virtue of the fact that he may be innocent in his conduct and that through no fault of his own subsequent prohibited mail has been sent. Once the act is done, the processes of the law are put into effect and the undue burdens and hardships of involving oneself in litigation become the price or punishment awaiting the sender. The law should therefore be declared unconstitutional.

Near v. Minnesota, 284 U.S. 697;
Freedman v. Maryland, 380 U.S. 552.

III.

The Statutory History, Including Committee Reports and Statements of Committee Members and Sponsors of Legislation, Support the Interpretation That Is Ascribed to the Statute by Appellants.

The language in the statute is most determinative of its interpretation.

Schwegmann Brothers, Calvert Distillers Corp., 341 U.S. 384, 390-5;
United States v. Oregon, 366 U.S. 643, 648.

The Court will also look, and has looked at all indicia in order to determine the legislative intent. *United States*

v. American Trucking Association, 310 U.S. 534, 542-544; *United States v. Dickerson,* 310 U.S. 554, 562; *Commissioner v. Estate of Bosch,* 387 U.S. 456, 563.

The importance of committee reports and statements of committee members or sponsors of legislation cannot be over emphasized as same as developed in the interpretation of statutes before this court. That this is another factor in the consideration of interpretation of the statutes has long since been established. *Wright v. Vinton Branch Bank,* 310 U.S. 440, 463-464; *United States v. United Mine Workers,* 330 U.S. 258, 278-280; *National Woodwork Manufacturers Assn. v. Labor Board,* 386 U.S. 610, 639-640.

The statute here in question was designed, to proscribe and prohibit any and all further mailing subsequent to an initial Prohibitory Order by the sender to the complaining addressee. Further, it is clear that the purpose and intent of this legislation was to place a prohibition upon the rental, selling, and transferring of lists containing the names of individuals who have obtained Prohibitory Orders. It is clear from all of the aforementioned indicia, that it is the individual citizen who is intended to be made the sole judge of whether an advertisement he receives is a pandering advertisement once he does this he unleashes the power of the federal government to enforce his views.

In fact, the legislative history indicates that a former House Committee Bill required the Postmaster General to decide what was or what was not pandering under the definition contained in the Bill. It was on the floor of the House, that another representative offered an amendment which was adopted and ultimately embodied in the present statute that provided that this

determination shall be made solely by the mail recipient. According to the legislative history, this had the effect of taking the Postmaster General out of the role of censor.[3]

All of this being the case, it clearly establishes that the interpretation given to the statute by Appellants is the correct interpretation and, therefore, for the foregoing reasons, the statute must fail because of its constitutional infirmities. The legislative history clearly states

> ". . . The Postmaster General is then required to issue an order to the sender directing him to refrain from sending *any further mailings of any kind to such person.*" (emphasis added).

The legislative history further points out that

> "if a sender continues to send mail to a person in violation of the order issued by the Postmaster General, an order may be obtained from an appropriate federal District Court, upon application by the Attorney General, for a court order commanding compliance with the provisions of this Title. A failure to observe this court order may be punished by the court as contempt."

There is no question but that from the legislative history it is discerned that mere subsequent mailing of sufficient, regardless of content or desire or innocense or willfulness, to constitute a violation of any order.[4]

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[3]U.S. Code and Congressional and Administrative News, 90th Congress, First Session, 1967 Legislative History, pages 2294-95. Ninetieth Congress. First Session on H.R. 7977, page 525.

[4]U.S. Code and Congressional and Administrative News, Ninetieth Congress, First Session, 1967 Legislative History 2294-95.

The report of the committee on Post Office and Civil Service matters further emphasis the point when in their report they state

> ". . . The mailer is prohibited not only from sending advertisements to the proscribed name but from sending any mail matter of any class or kind."

The same report indicates that the word "assigns" in subsection (c) of the statute means business successors.[5]

Former Attorney General Ramsey Clark, on behalf of the United States Department of Justice on May 29, 1967 directed a statement to the chairman of the Committee on Post Office and Civil Service Affairs of the House of Representatives.[6] The United States Department of Justice urged that this legislation not be passed because in its opinion the law was unconstitutional as appellants herein claim.

Quoting former Attorney General, Ramsey Clark, in his opposition to the passage of the statute, appellants note:

> ". . . Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutionality. *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963)."

It was the absolute intention of the author of this Bill to absolutely impede and restrain the transferring

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[5](Report of Committee on Post Office and Civil Service Matters, First Session of the 90th Congress, Senate, Report No. 801, at page 39.)

[6](Report of the Committee on Post Office and Civil Service Affairs, the House of Representatives, together with individual and minority views, the First Session, 90th Congress, Report No. 722, pages 71-73.)

of lists of names or the trafficking with same regardless of intent or subsequent mail content. The Congressman first sponsoring this Bill makes that clear in his testimony.[7]

The testimony of Timothy May, then General Counsel for the United States Post Office, testified that the addressee is not given the option of stopping a particular kind of mail but that he can only have a mailer directed to make no further mailings whatsoever.[8]
Further, Mr. May stated:

> ". . . As an addressee, I would be empowered to determine that all 'occupant' mail, soap advertisements, bills from creditors, income tax forms, even a letter from my Congressman, were pandering advertisements, and could prohibit any further mailings from such mailers on pain of contempt of court.
>
> "Needless to say, widespread use of these powers could plunge the postal system into chaos, and most certainly destroy the mail advertising industry. In short, I believe Title III to be impractical and an unnecessary means of dealing with the problem that concerns us all."

A statement of the Assistant Attorney General, Office of Legal Counsel, Dept. of Justice, is further submitted. It too calls the constitutionality of the proposed act into question and indicates that it goes beyond the

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[7](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 513 through 525).

[8](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, page 545).

scope of constitutional guarantees. It further substantiates that there is no question that once a Prohibitory Order is obtained no further mail may be disseminated by a mailer.[9]

The American Book Publishers Council urged against the passage of this Bill.[10]

The Magazine Publishers Association opposed the passage of the Bill and understood its interpretation consistent with that which the Appellants have contended from the very inception.[11] Joining the list of the groups that opposed the passage of this Bill was also the American Library Association.[12]

The Congressman who is responsible for the significant amendment to the original Bill testified before the Senate Committee in part as follows:

> "The absolute determination to state to the Post Office Department, 'I don't like this material because it is in my view erotically arousing or sexually arousing.' "

The Chairman then asked,

> "You don't have to make any case whatsoever?"

The Congressman replied,

> "None whatsoever. If he is hung up on cabbage, he can prevent the weekly market circular from

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[9](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 566-577).

[10](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 577-582).

[11](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 627-629).

[12](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, page 631).

coming in his house if he is willing to say that cabbage has caused him to become sexually aroused."

The Chairman then asked:

"This would reach, then, the prohibition of any mailing list if he states that he does not wish this to come into his house since he is the sole judge on the prohibition of any type of literature that he does not wish to come in?"

The Congressman replied: "Precisely." The Congressman went on further to say:

"If he (recipient) is willing to say that the automobile circular that comes to his house is objectionable because it is sexually arousing to him, he can prevent receiving the advertisement of the Buick. Maybe he is hung up on it. I don't know, and I don't care, is my point."

Further, the testimony of this co-sponsor of the Bill indicates the trafficking, dealing, selling, renting or exchanging of lists with names of persons who have sought Prohibitory Orders was designed to be defeated under the terms of this Bill.[13]

No other interpretation other than that which has been contended by the Appellant as to the interpretation and plain meaning of the statute would seem to be warranted against this background and language of the statute. It is submitted that because of this interpretation and because of what the statute intends to do, it must fail, both as a violation of the First Amendment and Fifth Amendment of the Constitution of the United States.

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[13](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 517, 525-534; 530, 531).

IV.

Section 301 of Public Law 90-206 (39 U.S.C. Section 4009) Violates the Fifth Amendment of the Constitution of the United States in That It Denies Due Process of Law.

The Statute here in question deposits rights to addressees, postmasters and courts. The rights, the granting of these rights and the exercise thereof are in violation of the Fifth Amendment of the Constitution. Both on its face and as applied to appellants herein the statute is in derogation of the Fifth Amendment.

Turning to the initial phase under the statute, it is clear that an addressee has an absolute right to obtain injunctive relief against a mailer without benefit of any type of hearing. The Postmaster General has no discretion as to the issuance of the initial Prohibitory Order once he receives a request from an addressee. 39 U.S. Code 4009(d) states ". . . The Postmaster General *shall* issue an Order if requested by the addressee . . ." (emphasis added). The statute in question grants to an individual addressee that which it could not grant to the Postmaster General. *Walker v. Popenoe,* 149 F. 2d 511 (1945) spoke to the issue. In that case, involving purportedly obscene materials the Court enunciated as follows:

> "In determining whether any publication is obscene, the Postmaster General necessarily passes on the question involving the fundamental liberties of a citizen, which is a judicial and not an executive function and must be exercised according to the idea of due process implicit in the Fifth Amendment."
>
> Page 513. "Appellants Order barring the pamphlet from the mails was issued without notice or

hearing. The trial court held, and we agree, that the Order was for that reason a denial of due process. Our views on this point are expressed in Judge Arnold's opinion in which, as in the present opinion, we all concur. But if the judgment were affirmed solely on this ground, the merits would have to be decided at a future hearing and at a future law suit. To obviate that necessity, we are deciding the merits now. The pamphlet is not covered by the statute. Since a contrary finding could not be supported, it is immaterial that the trial court made no finding. The result is that the judgment is affirmed on two distinct and independent grounds. If both these grounds were absent, we should have to consider whether Congress may constitutionally confine discussion of sex as it could not confine discussion of other subjects within the limits which it conceives to be good for the community."

At page 513, Justice Arnold stated the following:

". . . *The power to exclude a publication from the mails without a hearing in practical effect permits the Postmaster General to cause irreparable injury to any publisher without the minimum safeguard of an opportunity to present his case.* (emphasis added) There are, of course, other means of distribution besides the mails, but they are not effective ones in the case of ordinary publications. To deprive a publisher of the use of the mails is like preventing a seller of goods from using the principal highway which connects him with his market. In making the determination whether any publication is obscene, the Postmaster General necessarily passes on a question involving the fundamental liberty of the

citizen. This is a judicial and not an executive function. It must be exercised according the ideas of due process implicit in the Fifth Amendment. As we said in the case of *Pike v. Walker,* 121 Fed(2d) 37, 39: 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends a greater degree than upon any other activity of government, the promotion of the general welfare.' Not only this, but the postal system has a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution, and if they have, it would follow that in administering the laws established to protect the mail and the regulations thereunder, the duty of the Postmaster General would become to use the language of Justice Brandeis in the *Burleson* case, *supra,* 255 U.S. 407, that:

> 'In making the determination he must, like a Court or jury, form a judgment whether certain conditions prescribed by Congress exist, uncontroverted facts or by applying the law. The function is strictly a judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power—which is to say, that his authority is governed by Acts of Congress which confer it and by the law of the land.' "

Appellants argue that the right to issue and obtain the initial Prohibitory Order flies in the face of the Constitution and that the foregoing case supports this proposition.

Passing from the initial stage of procuring the Prohibitory Order, this statute vitiates Fifth Amendment guarantees in its second phase. This occurs when the Postmaster General rules upon the complaint he issued either because there has been a second mailing or because he, of any kind whatsoever in his belief, determined that such second mailing is similar to that which was personally found to be erotically arousing or sexually provocative to some other person.

The statute in granting this power places the Postmaster General astride the mails and undermines the protection of the due process clause of the Fifth Amendment of the Constitution of the United States.

Appellants respectfully submit that it is not sufficient that the United States District Court will finally determine whether any subsequent mailings are violative of Orders authorized under the statute. On the one hand, if the U.S. District Court's review is limited to the question of whether there has been a subsequent mailing of any kind whatsoever, then indeed the court serves as a rubber stamp for the complaint of the Postmaster General which is defective for the reasons heretofore stated. On the other hand, if the review by the U.S. District Court is for the purposes of determining whether subsequent mailings by a sender are similar to the mail which the addressee found within his sole discretion to be erotically arousing or sexually provocative (aside from the question of what process and standards are employed in making this determination) a prohibition

and illegality are being sought to be pronounced upon the materials which are not otherwise illegal Governmental action of the most direct kind is here interjected.

Additionally, it is noted that subsection (h) provides that Chapter 5 relating to administrative procedure and chapter 7 relating to judicial review of subchapter 2, part 1 of Title 5 of the United States Code, do not apply to the provisions of this section. By direct excision of this statute from the Administrative Procedures Act and particularly by virtue of the exemption of judicial review, serious question are raised not only as to the function of the United States District Court but also under the Fifth Amendment.

Appellants also urge that the attempt to ascribe a definition to pandering advertisement is not enough to resolve the function of the Postmaster General at the issuing stage of the complaint or the functioning of the U.S. District Court when a compliance order is being sought. A clear reading of the statute under the lower court's view would require a coalition of a pandering advertisement and the complete subjective factors of the initial recipient to establish the measuring standard. It is urged by the Appellants that, there can never be a coalition of these factors under the circumstances in the law as interpreted below.

It is clear also from all of the foregoing that the transacting, selling and transferring of lists are prohibited by virtue of the language and intent of this statute. This was the desired intent and it was achieved by virtue of this law. The appellants submit that this is a denial of property, and the handling of same and is as much an act or mode of doing business as are the goods of merchants doing business in a retail store.

Argument and discussion as same pertains to the actual procedures and the enforcement of this statute will be made in this Brief, *infra*. Notwithstanding the forthcoming objections and argument, it is submitted that the statute for the foregoing reasons is an absolute abridgement of the rights guaranteed to individuals under the Fifth Amendment of the Constitution of the United States. Predicated upon this reason alone, the statute should be declared unconstitutional.

V.

39 U.S.C. Section 4009 Violates the Constitution of the United States in That Said Statute Is Vague, Ambiguous, Standardless and an Unlawful Delegation of Power on Its Face and As Applied to Appellants.

Appellants urge that the ambiguity between section (a) and sections (b) and (c) of the statute can at best only be described as creating an unworkable and unconstitutional conflict within the statute itself. Based upon this infirmity the statute must fail.

A clear reading of the statute points up the fact that an addressee is vested with the sole discretion in determining upon what basis the judicial function of the issuance of a Prohibitory Order shall occur. There are no guidelines or standards by which this unfettered exercise of discretion is to be limited. It does not call for an objective determination or uniform determination, but rather a subjective conclusion by each member of a vast population.

Even more substantially and critically is that it cannot be ascertained with constitutional certainty by what standard the Postmaster General or even the United States District Court functions subsequently.

The two interpretations previously discussed which are namely, that (a) a subsequent mailing to a Prohibitory Order is *per se* a violation, or (b) it is only when similar material are mailed (*i.e.*, similar to that which gave rise to the initial Prohibitory Order) constitute an unlawful delegation of power or a standardless delegation of power to the Postmaster General and District Court of the United States. It cannot be ascertained from a reading of the statute what the standards are by which the complaint and compliance order, each in their turn, are to be issued.

Both opinions of the court below finds a standard after the first mailing has occurred and urges that other proposed mailings are to be measured by the objectionable material of such first mailing. Absent the identical mailing piece in the second submission through the mail, it is quickly questioned how the measurement operates. Since the sole discretion of an individual acting within the framework of himself in determining that an item of mail is erotically arousing or sexually provocative is necessary and the regulating authority does not have benefit of his thoughts as they relate to the subsequent mail, the measurement cannot be made by any standard.

The delegation of this judicial function carries no criteria or standard for the Postmaster General. The lower court seeks to shrink the otherwise loosely woven fabric of the statute to create a constitutional structure from which the statute may be applied and enforced.

The statute is void for vagueness. Due to the standardless delegation of power, this deposit of power is unlawful. Due to the ambiguous language which require tortuous judicial interpretation for salvage the statute

is void. A statute imbued with all of these infirmities which seeks to regulate communication and expression cannot and should not survive in a society of law.

The infirmities within the statute are not cured because contempt for violation of an order cannot occur until the order of the Postmaster General is reaffirmed or pronounced by a United States District Court. The fact that the statute can cause an individual to be brought before the United States District Court after he has been funneled through the purported administrative procedure involved herein is an unconstitutional burden. The fact that he once again appear before the United States District Court for violation of the District Court's order is hardly a situation which is cured by asserting that there is no danger of any penalty until subsequent conduct contrary to the order of the United States District Court has occurred. An expensive human price is being asked to be paid by a statute which can "only be salvaged by meticulously construing its provisions to shrink its loosely woven fabric to constitutional size."[14]

It is patently clear that the law of the land declares Congressional enactments which are vague or standardless, repugnant to the Constitution and have consistently struck them down. *Winters v. New York,* 333 U.S. 507; *Giacco v. Pennsylvania,* 382 U.S. 399; *Arizona v. California,* 373 U.S. 546, 625, 626; *Schecter Poultry Corp. v. United States,* 295 U.S. 495; *Panama Refining Company v. Ryan,* 293 U.S. 388. Indeed, the statute herein purports to repose in the addressee or the Postmaster General all of the powers of the three branches

[14]Appendix p. 69 Circuit Judge Hufstedler concurring Opinion.

of this Federal government almost wholly unfettered. The words of Justice Cardozo in his concurring opinion in *Schecter Poultry Corp. v. United States,* 295 U.S. 495, reverberate the hollow shell of this statute wherein he described the NRA Code as "a delegation running riot."

Justice Harlan, in the case of *Arizona v. California,* 373 U.S. 546, 626, stated:

> ". . . The principal that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it inures that the fundamental policy decisions in our society will be made not by an appointed official, but by the body immediately responsible to the people. *Second,* it prevents judicial review from becoming merely an exercise at large by providing the Courts with some measure against which to judge the official action that has been challenged."

The case of *Carter v. Carter Coal Company,* 298 U.S. 309, 311, reiterates the sentiment and law applicable to this situation:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities . . ."

". . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty in private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to a decision of this Court which forecloses the question. A.L.A. Schecter Poultry Corp v. United States, 295 U.S., page 537. . . ."

The proposition cannot be stated more eloquently by this writer.

Solace and superficial strength is attempted to be garnered from the case of *Ginsburg v. United States,* 383 U.S. 463 on the baseless grounds that pandering advertisements were defined and hence a standard created. This is not true. Indeed one is impressed by the review for standards in making a determination as is evidenced in the *Ginsburg* case. The admonitions concerning pandering statutes and their definiteness was made known in that case.

VI.

The Procedures Provided for in Connection With the Statute Cause the Statute to Violate the First and Fifth Amendments and in Themselves Are so Violative.

Attached to the affidavit of Lee J. Winkler as an exhibit thereto and marked Exhibit "F" (A 30-35) are the rules of practice and proceedings relative to violations under 39 U.S. Code 4009. Rules are found at 39 C.F.R. part 956. These rules are made applicable to administrative hearings requested pursuant to 39 U.S.

Code 4009(d). At the time of the argument in the court below, several of the appellants herein, including Lee J. Winkler, dba Quality Products, had been involved in hearings pursuant to the aforesaid section.

As brought to the attention of the court below both in writing and orally, appellants involved in those hearings are subjected to the following:

1. There is no right to subpena witnesses or complainants;

2. The regional counsel of the Post Office Department is the hearing officer;

3. The taking of depositions are circumscribed and can only be had upon permission of the hearing officer;

4. The party seeking to take a deposition is to pay all fees required to be paid to a witness and the deposition officer (which cannot be ascertained from the reading of any document);

5. The proceeding is not adversary in nature;

6. A finding and determination under these rules is capable of being supported entirely by hearsay, and the right to cross-examination is made meaningless under the procedures;

7. There is no definite time limitation as to when a matter must be brought to hearing, but rather vague reference to "whenever practicable, the hearing date will be within 30 days from date of the notice of hearing served on the mailer;"

8. No provision for findings of fact or conclusions of law are made necessary.

Several conclusions can be drawn from a reading of these procedures. The first of such conclusions is that

the statutory scheme embodied in 39 U.S.C. 4009 was enacted to clearly eradicate and eliminate materials and mailers which some people find offensive because they may deal with sex or they may believe they deal with sex. The law in its language as has been urged, *supra,* and in its legislative history and intent, makes this clear. In addition the exemption of the hearing procedure and the law itself from the administrative procedure act and to the procedures concerning judicial review relative to administrative proceedings, is an aid to that statutory scheme of complete censorship, restraint and attempt at ultimate control of certain facets or types of communication.

Winkler was involved in a hearing growing out of 39 U.S.C. 4009(d). A decision emanating from that hearing is attached to his affidavit and marked Exhibit "E". (A28-29.) At that hearing originally all of the objections as set forth hereinabove were raised. All of the objections were overruled. Indeed, there was no question in the hearing officer's mind that all that was necessary to establish a violation of the order was merely to show a subsequent mailing of any type of material. It was even brought to the attention of the hearing officer that two different mailing lists were involved, but it was quickly pointed out by the hearing officer that the statute covered the rental of lists and transacting therewith.

The American Bar Association, upon the recommendation of the Postal Matters Committee, the Administrative Law Section, the Board of Governors and the American Bar Association House of Delegates approved the resolution which in word, substance and effect requested the non-passage of this law or an iden-

tical law, because of its abridgement of First Amendment and Fifth Amendment rights.[15]

Quoting from a part of that testimony,

> ". . . The American Bar Association regards this exception to usual APA requirements as an unfortunate setback or retrogression in the progressive evolution of administrative law. The Attorney General heretofore has shared this view, and we understand that he continues to do so. The courts have held that APA guarantees are applicable to POD administragive obscenity proceedings. *Door v. Donaldson,* 90 App. DC 188, 195 Fed.2d, 764, (1952); *Walker v. Popenoe,* 80 App. DC 129 (1945). Absent an express statutory exclusion, I have no doubt the courts would continue to hold the APA applicable to POD administrative obscenity proceedings as to other POD proceedings required by statute. The American Bar Association opposes the enactment of legislation which would deny a litigant Administrative Procedure Act protections, however worthy the cause which might lead to such denial."
>
> The hearings granted herein are technical and not substantive. When dealing with one's right to free speech and to the free distribution of ideas and material, such abridgement or intrusions should not occur except by substantive determination pursuant to law permitting due process."

Parenthetically it is interesting to note that the remainder of the testimony mentioned herein clearly re-

[15](Hearings Before the Committee on Post Office and Civil Service, United States Senate, Ninetieth Congress, First Session, on H.R. 7977, pages 593-599).

peats the interpretation of the statute before the Senate Committee which was argued by the appellants in this matter in the lower court.

In the case of *Freedman v. State of Maryland,* 380 U.S. 52 (1965) this court in reviewing a censorship statute stressed the necessity for procedural safeguards within a statutory scheme seeking to impose restraint or censorship on expression. As stated there and applicable here, had Congress intended to do same "a model is not lacking."

The statute with its appurtenant procedures are insidious to First and Fifth Amendment rights guaranteed by the Constitution of the United States and the statute should be stricken.

VII.

Commercial Activity in No Way Removes the Protection and Guarantees Afforded by the First Amendment.

The opinion below urged that commercial advertising or commercial activity is not afforded the same protection within the First Amendment of the Constitution as other items of expression, speech or press.

Ginsburg v. United States, 383 U.S. 463, 474, recited,

> ". . . No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; the sanctioned consideration of this fact might indeed induce self censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of

expression secured by the First Amendment. (See *New York Times v. Sullivan,* 376 U.S. 254, 265-266; *Smith v. California,* 361 U.S. 147, 150). . . ."

In *Smith v. California,* 361 U.S. 147, 150, the Court in speaking of free publication and dissemination of books and other forms of the printed word, said

". . . It is of course no matter that dissemination takes place under commercial auspices. See *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 195; *Grosjean v. American Press Co.,* 297 U.S. 233. Certainly a retail book seller plays a most significant role in the process of the distribution of books."

It is submitted that *Valentine v. Chrestensen,* 316 U.S. 52, is peculiar unto itself, and has no application to the situation at hand. Indeed, not a single authority is embodied within that case and further, the facts are unique within the framework of that case and readily distinguishable from the matter at hand.

Comfort is sought to be gained from *Ginsburg v. United States, supra,* wherein one of the notes thereto states,

"material sold solely to produce sexual arousal, like commercial advertising, does not escape regulation because it has been dressed up as speech. . . ."[16]

It is almost unnecessary to state the view taken in *Ginsburg v. United States* and what, in fact, was held and meant. If speech and expression falls outside of the First Amendment to the Constitution as the majority of this court holds with regard to certain forms of speech, then it is not protected with the force and ef-

[16]*Ginsburg v. United States,* 383 U.S. 463, 475, n. 17.

fect of the Constitution, but if the speech is not unlawful, such as the expressions and materials involved in this case, then the full comfort and protection of the First Amendment is afforded to it whether it seeks to convert or sell the receipient.

Holding contrary to the foregoing would indeed frustrate the purpose of Congress. It would mean that the offering to give away materials which are sexually provocative or erotically arousing fall outside the purview of this statute and the offering to sell, for example, Theodore Dreiser's, American Tragedy, is within the condemnation of this statute. It is respectfully submitted that this is far too tenuous a distinction upon which to tamper with the freedom of expression, speech and press. The statute cannot be given continuous life predicated on the alleged unconstitutionality of commercialism.

VIII.

The Right of Privacy Is Not Involved.

In the court below and within sone of the events going to make up the total Congressional history of this statute was a concept that a polarity had been created between the First Amendment guarantee of free speech and a purported First Amendment right known as privacy. A pitting of right against right was created in these various events. The contrived confrontation of alleged constitutional imperatives was thus made into the proverbial irresistable force coming into contact with the immovable object.

Argument and discussion has centered around which right is the greater. One judge in the court below argued that indeed there was only an amorphous right such as

the right of privacy contained within the First Amendment.

Appellants submit that a determination of the issues involved herein do not require a determination of whether there is such a right of privacy embodied within the First Amendment. Also that no determination is necessary if, indeed, it does exist, as to which of the rights is greater or which must give way. Appellants contend that the statute is fatally defective for all of the heretofore given reasons. Hence it would follow that the determination concerning right of privacy does not come into play, at least on this day.

If the statute is defective for any of the foregoing reasons, then and in that event, it would fall regardless of whether the right of privacy is a protectible interest within the First Amendment of the Constitution or any other portion of the Constitution.

Assuming for purposes of argument, however, that in some way the analysis reaches the concepts of free speech and right of privacy, appellants reason as follows:

That the right of privacy is an amorphous concept, if not an anomalous concept, within the Constitution of the United States.

The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive and the right to read. *Griswold v. State of Connecticut,* 381 U.S. 479. *Stanley v. Georgia,* 89 Supreme Court 1243 (1969).

> "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . neces-

> sarily protects the right to receive . . .!" " . . . This right to receive information and ideas, regardless of their social worth . . ., is fundamental to our free society."

Both of these cases cite the well known line of cases involved in the very area in which Appellants find themselves.

Free speech and press, indeed, all forms of expression, would virtually become worthless unless there were someone with whom to communicate. This is the matrix of a civilized and ordered society.

The statement or concept that the right of privacy can subvert and thwart these constitutional imperatives is an enigma to our philosophy.

It does seem that if the view is adopted that, in fact, right of privacy is not embodied in the Constitution, then the discussion would be at an end. On the other hand, if the view is adopted that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance and that various guarantees create zones of privacy, it is submitted that that which is being done by Appellants does not vitiate the penumbra or invade a zone of privacy created.

The recipients are not captives. They are not exposed to the blaring of sound trucks and horns which permeate the walls of their homes. They are not confronted by the foot in the door salesman who will not take no for an answer or subjected to face-to-face confrontation with persons who have devious intentions and who disguise themselves as door-to-door sales people. (*Cf.*) (*Breard v. Alexandria,* 341 U.S. 622; *Kovacs v. Cooper,* 336 U.S. 77.)

The recipients are in no other position than they are with their radios and televisions in this modern and complex society. The rays that are in the cathode tubes in each person's home and may explode with offensiveness or erotically arousing or sexually provocative fare when the television set is turned on, exploits privacy of the home more so than the envelope deposited in the mailbox. Shall a tenuous distinction be drawn between a fact that a mailbox may be outside of the home and the television within the home and, hence, the latter is closer to the center of the zone of privacy and, therefore thrusts forth a greater threat to one's privacy.

The statute here in question does not seek to shield or guard minors from materials which are otherwise unlawful. Indeed, let the Congress of the United States make this material unlawful if it can meet the Constitutional measures, and let it set forth to protect the persons they deem protectible and then let the statute attempt to pass the Constitutional muster.

Yet, further, if it is adopted that there is a specific and fundamental guarantee of right of privacy under the First Amendment or Fifth Amendment via the thesis that this concept is "so rooted in the traditions and conscience of our people as to be ranked as fundamental" then it is submitted that the irresistable force has indeed met the immovable object. If this be the situation, Appellants submit that in the balancing of the interests under the circumstances here at hand and particularly involving an envelope with a notification of what is

involved,[17] that the right of privacy must yield to the right of free speech and press.

In the case of *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 880, the proposition was stated more eloquently than this writer is capable of doing. The court said:

> ". . . The mailbox, however noxious its advertising contents, often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life'. The short, the regular journey from mailbox to trash can—the contents of which the state chooses to pay the freight when it facilitates the distribution of trash—is an acceptable burden, at least so far as the Constitution is concerned. The bells at the door and on the telephone, through their ring, is more imperious nuisance than the mailman's tidings, accomplish more peripheral assaults than the blare of an inescapable radio."

It should be noted that in the case of *Breard v. Alexandria,* 341 U.S. 622, undoubtedly to be cited as support for the opposition, the court in upholding a non-solicitation ordinance pointed out:

> ". . . *The usual methods of solicitation—*radio, periodicals, mail, local agencies—are open.*" (Emphasis added).

For these reasons Appellants seek to lay to rest in this specific instance the objection as allegedly supported by the concept of the right of privacy.

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[17]Appendix 28 Exhibit D.

IX.

The Uncontroverted Evidence Together With the Concurrence as to Statutory Interpretation Does Not Support the Decision and an Injunction Should Have Issued.

The legislative history, the government's concurrence in the appellants' view of the statutory purpose, the intent and the plain meaning of the statute does not support the findings of fact and conclusions of law. The affidavits of the several appellants all of which were uncontroverted stand only in opposition to the findings of fact.

Further the multiplicity of litigation and the irreparable harm wrought by this statute gave rise to the need for the injunction sought.

Here as in *Dombrowski v. Fister,* 380 U.S. 479 injunction is appropriate. The statute has a chilling effect and threatens litigation and prosecution. The denial thereof and dismissal below is not supported in fact or law.

Conclusion.

It is respectfully submitted that the argument of Appellants should be sustained. Appellants urge that Section 301 of Public Law 90-206 (39 U.S.C. § 4009) should be declared null and void because it is unconstitutional for each and all for reasons contained herein. Appellants request that the judgment of the Court below be reversed.

JOSEPH TABACK,
GOLD, HERSCHER & TABACK,
Attorneys for Appellants.

EXHIBIT A.

UNITED STATES OF AMERICA
POST OFFICE DEPARTMENT

Quality Products
~~Post Office~~
PO Box 1045
Hawthorne, CA 90250

PROHIBITORY ORDER

NO. 37

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Jos. E. Martin
(Name of Addressee)

Boaz, Alabama 35957;
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, 4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [~~and his minor children residing with him who have not attained the age of eighteen years~~].

NOW, THEREFORE, pursuant to the cited statute and the authority delegated to me by the Postmaster General, Title 39, C.F.R. 956, _____ F.R. _____, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after your receipt of this order:

_____ _____
_____ _____
_____ _____

ADDRESS: 702 Martin Avenue
(Street)

Boaz, *(City)* Alabama *(State)* 35957 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

BY ORDER OF THE POSTMASTER GENERAL

E. F. PALMER, POSTMASTER

E. F. Palmer
Postmaster

Birmingham, AL 35203
Address

[POSTMARK] BIRMINGHAM, ALA. APR 26 1968

Dated: April 26, 1968